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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAM ARAMONY and THOMAS J. MERLO,
Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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ARGUMENT

I. *PINKERTON*

1. The government conceded at oral argument in the court of appeals that the district court erred in omitting the "reasonable foreseeability" element from its *Pinkerton* instruction. In this Court, the government acknowledges that "[t]he better practice is to include 'reasonable foreseeability' language in any *Pinkerton* instruction." Opp. 10. Despite these concessions, the government asserts that "the district court's instruction adequately conveyed *Pinkerton*'s theory of co-conspiratorial liability" by requiring the jury to find that "the substantive crime was committed during the existence or life of and in furtherance of the goals of the conspiracy." Opp. 10. But at least two courts of appeals have rejected this contention. *See United States v. Turcks*, 41 F.3d 893, 897 (3d Cir.

1994), *cert. denied*, 115 S. Ct. 1716 (1995); *United States v. Broadwell*, 870 F.2d 594, 603 (11th Cir.), *cert. denied*, 493 U.S. 840 (1989). The government's argument merely underscores the division among the courts of appeals over the proper scope of *Pinkerton* liability.

2. The government acknowledges that the circuits have split on whether the "reasonable foreseeability" element must be included in a *Pinkerton* charge. Opp. 9-10.[1] It suggests, however, that the split does not justify granting the petition, because "[w]e are aware of no case . . . in which a court of appeals has reversed a conviction because the *Pinkerton* instruction omitted such language." Opp. 10. In fact, at least one court *has* reversed a conviction under circumstances indistinguishable from this case. *United States v. Tang*, 1996 U.S. App. LEXIS 2548, at *8 (9th Cir. Feb. 2, 1996) (unpublished) ("We hold that reasonable foreseeability is an element of *Pinkerton* co-conspirator liability that must be specifically decided by the jury. The district court erred when it refused to submit this element to the jury. Under [the Ninth Circuit's decision in] *Gaudin*, such an error cannot be harmless." (quotation omitted)).

3. Other cases holding that omission of the "reasonable foreseeability" element constitutes error have declined to reverse under the "plain error" and "harmless error" doctrines. *See, e.g., Turcks*, 41 F.3d at 897-99 (plain error); *Broadwell*, 870 F.2d at 609 (harmless error).[2] But the results in these cases do not diminish the importance of the circuit split on the "reasonable foreseeability" element of *Pinkerton*. The issue presented here—and the

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[1] The split has deepened since the petition was filed. The Tenth Circuit has now joined the Fourth in holding that "reasonable foreseeability" is not an essential element of *Pinkerton* liability. *United States v. Willis*, 102 F.3d 1078 (10th Cir. 1996).

[2] Because petitioners made a timely objection to the district court's omission of the "reasonable foreseeability" element, no question of "plain error" arises here.

issue decided by the Fourth Circuit below (Pet. App. 17a-22a)—is whether *Pinkerton* liability requires proof that the substantive offense was reasonably foreseeable. The parties agree that this issue has split the circuits. The Court should resolve the split, particularly because the Court itself created *Pinkerton* liability and no statutory language or legislative history exists to guide the lower courts.[3]

4. The government contends that the Court should deny the petition because the district court's omission of the reasonable foreseeability element was harmless. Opp. 10. But for the reasons stated above, the harmless error issue need not be addressed here with respect to the *Pinkerton* instruction; the court of appeals did not address that issue, and petitioners have not raised it here. Thus, the asserted harmlessness of the district court's error provides no basis to deny the petition.

5. The government's discussion of harmless error misses the mark in any event. The government contends that the omitted reasonable foreseeability instruction was harmless because "it appears likely that petitioners' convictions on the substantive counts rested not on a *Pinkerton* theory, but on their direct involvement in the substantive offenses at issue, either as principals or as aiders and abettors." Opp. 10-11. The government's argument overlooks the rule of *Stromberg v. California*, 283 U.S. 359 (1931), and its progeny. In *Stromberg*, this Court held that when the trial court instructs on several theories of criminal liability, one of which contains a constitutional flaw—as the *Pinkerton* theory did here—and the jury returns a general verdict of guilty, an appellate court must presume that the jury relied on the constitutionally defec-

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[3] To our knowledge, the *Pinkerton* doctrine is the only non-statutory basis for criminal liability under federal law.

tive theory. *See, e.g., Griffin v. United States*, 502 U.S. 46, 55-60 (1991); *Stromberg*, 283 U.S. at 368.[4]

6. Under *Griffin* and *Stromberg*, the Court must presume that the jury relied on the improper *Pinkerton* instruction, and any harmless error inquiry must incorporate that presumption. The Court must conduct the harmless error inquiry as if the jury had been instructed solely on the *Pinkerton* theory of liability. This analysis presents two questions (neither of which the government addresses): whether omission of the "reasonable foreseeability" element is subject to harmless error review, and, if so, the nature of that review.

7. On the first point, several cases have concluded that failure to instruct the jury on an element essential to a finding of criminal liability cannot be harmless. *See, e.g., United States v. Wiles*, 102 F.3d 1043 (1996) (en banc), *modified in part on other grounds*, 1997 U.S. App. LEXIS 2736 (10th Cir. Feb. 14, 1997); *Tang*, 1996 U.S. App. LEXIS 2548, at *8; *United States v. Baumgardner*, 85 F.3d 1305, 1309-10 (8th Cir. 1996); *United States v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996). Other cases have applied some form of harmless error review to instructions that omit an essential element. *See, e.g., United States v. Keys*, 95 F.3d 874, 880-81 (9th Cir. 1996) (en banc), *petition for cert. filed* (Jan. 9, 1997); *United States v. Rogers*, 94 F.3d 1519, 1524-27 (11th

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[4] Apart from overlooking the *Stromberg* rule, the government understates its burden of establishing harmlessness (if harmless error analysis applies at all, *see infra*). The government has the burden of showing that constitutional error is harmless beyond a reasonable doubt. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 295 (1991); *Chapman v. California*, 386 U.S. 18, 24 (1967). The government's bare assertion that "it appears likely" that the jury did not rely upon the *Pinkerton* theory does not come close to satisfying the "beyond a reasonable doubt" standard. The government's harmless error argument is further undercut by the fact that it requested the *Pinkerton* instruction, Pet. App. 17a, and it argued the *Pinkerton* theory to the jury in closing. Having urged the *Pinkerton* theory vigorously at trial, the government cannot argue now that the jury ignored that theory.

Cir. 1996), *petition for cert. filed* (Feb. 12, 1997). In light of this split in the circuits, the harmless error issue itself merits the Court's review, if the Court should decide to reach it.

8. On the second point—the nature of any harmless error review of the omitted "reasonable foreseeability" instruction—petitioners should prevail. Courts that have applied harmless error review to an omitted element have done so narrowly; such courts typically have held that the omission is harmless only when "the jury necessarily found the omitted element." *Keys*, 95 F.3d at 881; *see, e.g., Waldemer v. United States*, 98 F.3d 306, 309 (1996), *modified in part*, 1997 U.S. App. LEXIS 823 (7th Cir. Jan. 16, 1997). The government has never argued here —and could not do so—that the jury "necessarily found" the "reasonable foreseeability" element.

9. The Court should grant the petition to determine whether "reasonable foreseeability" constitutes an essential element of *Pinkerton* liability. In light of the government's harmless error argument, the Court might also wish to determine whether harmless error can apply to an instruction that omits an element essential to a finding of criminal liability and, if so, the nature of that review.

II. DIRECTED VERDICT ON MATERIALITY.

1. The government asserts that "any false statement on a tax return that underreports income or overstates deductions is necessarily material *as a matter of law*." Opp. 12 (emphasis added). The government's contention conflicts with this Court's decision in *United States v. Gaudin*, 115 S. Ct. 2310 (1995), which holds that the jury—and not the court—must decide the question of materiality. *See United States v. Uchimura*, 1997 U.S. App. LEXIS 3292, at *10-*11 (9th Cir. Feb. 25, 1997) (applying *Gaudin* to determination of materiality under 26 U.S.C. § 7206); *United States v. Dirico*, 78 F.3d 732, 736 (1st Cir. 1996) (same); *United States v. DiDomenico*, 78 F.3d 294, 302-03 (7th Cir.) (same), *cert. denied*,

117 S. Ct. 507 (1996). *But see United States v. Klausner*, 80 F.3d 55, 61 (2d Cir. 1996) (finding, after *Gaudin*, that materiality is a question of law under § 7206), *petition for cert. filed* (Nov. 12, 1996).

2. Apart from conflicting with *Gaudin*, *Uchimura*, *Dirico*, and *DiDomenico*, the government's argument does not address the issue here. The Fourth Circuit assumed that the district court should have submitted the materiality issue to the jury, Pet. App. 26a, and it proceeded directly to the harmless error inquiry, Pet. App. 26a-30a. That is the only issue that the court of appeals decided with respect to the § 7206 counts, and it is the issue that petitioners seek to have this Court review. In *Gaudin*, this Court held that materiality under 18 U.S.C. § 1001 must be submitted to the jury, without first deciding whether materiality is an element of a § 1001 offense. *See* 115 S. Ct. at 2322-23 (Rehnquist, C.J., concurring) (noting that the issue had not been decided). In the same fashion, the Court can address the harmless error issue here, without first deciding whether materiality under § 7206 must be submitted to the jury.[5]

3. As petitioners demonstrated previously, Pet. 13-14, the circuits have split on whether a directed verdict on an element of an offense can be harmless error. That split has deepened since the petition was filed. *Compare Uchimura*, 1997 U.S. App. LEXIS 3292, at *13-*15 (directed verdict on materiality "structural" error not subject to harmless error review); *Wiles*, 102 F.3d 1043 (failure to instruct on materiality "structural" error not subject to harmless error review), *with United States v. De Castro*, 104 F.3d 1289 (11th Cir. 1997) (directed verdict on materiality subject to harmless error review).[6]

[5] In light of the conflict between *Uchimura*, *Dirico*, and *DiDomenico* on one hand and *Klausner* on the other, the Court might wish to decide whether, following *Gaudin*, the issue of materiality under § 7206 must be submitted to the jury.

[6] The government confuses the issue by referring to the error here as an "instructional omission" and a "failure to submit the

4. The government attempts to reconcile the decisions of the courts of appeals on the ground that no case "has reversed a conviction for *Gaudin* error even where, as here, the jury actually made the functional equivalent of a materiality finding." Opp. 14. But a fair reading of *Uchimura*, *Wiles*, *Dirico*, and *Pettigrew* leaves no room to argue that those cases might have reached a different result if the "functional equivalent" standard had been met. Each case concludes that a partial directed verdict on materiality constitutes a "structural" defect that requires reversal without harmless error analysis. Those decisions conflict squarely with other cases (cited at Pet. 13 and Opp. 14) that apply harmless error review to a partial directed verdict. The Court should grant the petition to resolve the split.

III. ATTORNEY-CLIENT PRIVILEGE.

1. The government notes that the declarations of the lawyers and other documents produced by the prosecution tended to show that Aramony did not have an attorney-client relationship with Carter and the Verner, Liipfert attorneys. Opp. 16-17. It concludes that "it was well within the district court's discretion to deny an evidentiary hearing on the issue of attorney-client privilege." Opp. 16. But the government—like the courts below—ignores the substantial contrary evidence, which we summarized in part at Pet. 3. In light of the significant conflicts

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materiality issue to the jury." *E.g.*, Opp. 13. In fact, the district court did not merely omit materiality from its instructions; it directed a verdict on that issue. The courts of appeals have split over whether harmless error review applies differently to instructions that direct a verdict on an element and instructions that omit an element. *Compare De Castro*, 104 F.3d 1289 (applying harmless error to partial directed verdict), *with Keys*, 95 F.3d at 880-81 (partial directed verdict not subject to harmless error review; omission of element may be harmless under narrow circumstances), *and Rogers*, 94 F.3d at 1526 n.13 (same).

between the opposing declarations and the remainder of the documentary record, Aramony had a right to an evidentiary hearing as a matter of due process.

2. The government faults Aramony for his asserted "failure to present credible evidence of his own to support his privilege claims." Opp. 16-17. But as we have demonstrated, Pet. 3, Aramony *did* present such evidence. And he would have produced more—and exposed the shortcomings of the government's contrary evidence—if the district court had conducted an evidentiary hearing on the attorney-client issue. The government's position on this point is patently unfair; it criticizes Aramony for not producing evidence after having fought tooth and nail in the courts below to deny him the hearing at which he could do so.[7]

3. Similarly, as to Merlo, the government fails to address the fact that Merlo's former counsel, John Hume —who violated Merlo's attorney-client privilege by disclosing information to the government in a pre-indictment interview, without Merlo's knowledge or authority—was present in court and prepared to offer testimony at the hearing on Merlo's motion to suppress. Pet. App. 54a. Despite Hume's presence, the court denied Merlo's request for a hearing.

4. The petition cites a series of cases from other circuits with which the court of appeals' decision conflicts. Pet. 14-15. The government offers no analysis of those cases. It simply asserts that "[i]n the decisions at issue, the defendants had made more colorable claims of privilege than petitioners made here, and they therefore had

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[7] The government asserts that Aramony "did not seek the testimony of the Verner, Liipfert attorneys." Opp. 5. That is incorrect. Although Aramony did not call the Verner, Liipfert attorneys as witnesses *before the jury at trial*, he requested an evidentiary hearing at each stage—before, during, and after trial—at which those attorneys could be questioned.

a more plausible factual basis for seeking appellate relief based on the denial of an evidentiary hearing." Opp. 17. But even a cursory reading of those cases demonstrates the government's error. The declarations and other documents presented to the district court established every bit as "plausible" a "factual basis" for appellate relief as did the defendants in the cases on which petitioners rely. The decision of the court of appeals conflicts squarely with those cases, and this Court should grant the petition to resolve that conflict.

IV. THEORY OF THE DEFENSE INSTRUCTION.

Merlo clearly requested that the district court give a theory of the defense instruction, which the court said it would not give. Pet. App. 69a. The tendering of such an instruction for filing the following morning would have been mere surplusage in light of the court's ruling that it would not give any theory of defense instruction, no matter what was tendered. Pet. App. 69a. As discussed in the petition, the law is clear that Merlo was entitled to such an instruction. The district court's erroneous refusal has been upheld by the court of appeals, which conflicts with the law of other circuits. The Court should therefore grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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